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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-325

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
Respondents.

On Writ Of Certiorari To The Arkansas Supreme Court

RESPONDENTS' MOTION FOR LEAVE TO FILE A BRIEF ON REARGUMENT

Respondents hereby move for leave to file the attached Brief on Reargument. This case was argued on March 22, 1989. On July 3, 1989, the Court restored the case to the Calendar for reargument, which is now set for December 6, 1989.

In the past, parties in cases set for reargument have been permitted to file additional briefs; some have sought and been granted leave to do so. R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 276-77, 575 (6th ed. 1986). The Court's Rules do not appear to address the

situation. Our Brief on Reargument in this case should, we believe, be accepted because it discusses a number of post-argument developments (*cf.* Supreme Court Rule 35.5) and seeks to clarify our position in this rather complex case prior to reargument.

We have contended that the Court does not have the power, in light of the Eleventh Amendment, to subject Arkansas to a retroactive monetary award in a case arising under the Commerce Clause. Late in the Term, the Court handed down several decisions concerning the Eleventh Amendment and Congress' power to expose the States to monetary liability. *Pennsylvania* v. *Union Gas Co.*, 109 S.Ct. 2273 (1989); *Hoffman* v. *Conn. Dep't of Income Maintenance*, 109 S.Ct. 2818 (1989); *Dellmuth* v. *Muth*, 109 S.Ct. 2397 (1989); *Will* v. *Michigan Department of State Police*, 109 S.Ct. 2304 (1989). In addition, the Court reaffirmed the rule of *Hans* v. *Louisiana*, 134 U.S. 1 (1890), which petitioners opposed. *Dellmuth* v. *Muth*, 109 S.Ct. at 2401 n.2. These cases, and particularly the opinions in *Union Gas*, which concerned Congress' authority under the Commerce Clause, lend further support to our position, as the Brief on Reargument explains.

Several other decisions handed down by the Court after oral argument are also significant to this case and are discussed in the Brief on Reargument. Because the nature of the constitutional violation affects whether a particular remedy is warranted, it is critical to identify with precision why the HUE tax was invalid. *Healy* v. *Beer Institute, Inc.*, 109 S.Ct. 2491 (1989), and *Amerada Hess Corp.* v. *Director, Div. of Taxation*, 109 S.Ct. 1617 (1989), both of which were decided under the Commerce Clause, assist in this regard. Also, in *Quinn* v. *Millsap*, 109 S.Ct. 2324 (1989), the Court made clear that its power to decide whether a State has violated the Constitution is

not coextensive with its power to order a particular remedy for that violation.

In addition, the oral argument in this case has suggested to respondents additional arguments and the need to sharpen and amplify the arguments we have made. This, we believe, is better accomplished in writing in light of the complexity of the underlying facts of this case. The Brief on Reargument therefore discusses why, in light of *Healy, Amerada Hess* and *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266 (1987), petitioners were not "victims of discrimination" in the sense they have claimed and why granting them a monetary award would not restore interstate commerce to a plane of equality with intrastate commerce.

The Brief on Reargument also answers contentions petitioners raised in their reply brief, at oral argument and in their *amicus* brief in the companion case. In light of the factual intricacies in this case, these arguments cannot be readily answered except in writing. We have filed but one brief in this case. On the other hand, petitioners have filed a 49-page opening brief, an over-sized reply brief consisting of 25 pages of text and a three page "appendix" citing cases, and a 30-page *amicus* brief in *McKesson Corp.* v. *Div. of Alcoholic Beverages & Tobacco, Dept. of Business Regulation of Florida*, No. 88-102, Oct. Term 1989, replete with arguments about this case with which we strongly disagree.

For the foregoing reasons, respondents respectfully

request that the Court grant them leave to file the attached Brief on Reargument.

A. RAYMOND RANDOLPH
PEPPER, HAMILTON & SCHEETZ
1300 19th Street, N.W.
Washington, D.C. 20036
(202) 828-1200
Counsel for Respondents

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ROBERT L. WILSON
A. T. GOODLOE, II
Arkansas Highway and Transportation Department
P.O. Box 2261
Little Rock, Arkansas 72203
JOE MORPHEW
Revenue Legal Counsel
P.O. Box 1272-L
Little Rock, Arkansas 72203
JAY WILLS
Assistant Attorney General
200 Tower Building
Fourth & Center Streets
Little Rock, Arkansas 72201
Of Counsel:
CHRISTOPHER O. PARKER
Eichenbaum, Scott, Miller, Liles & Heister
1400 Union National Bank Building
Little Rock, Arkansas 72201

A. RAYMOND RANDOLPH
DANIEL I. PRYWES
BRUCE R. STEWART
Pepper, Hamilton & Scheetz
1300 19th Street, N.W.
Washington, D.C. 20036
(202) 828-1200
HERSCHEL H. FRIDAY
Counsel of Record
B.S. CLARK
ROBERT S. SHAFER
Friday, Eldredge & Clark
2000 First Commercial Building
Little Rock, Arkansas 72201
(501) 376-2011
Counsel for Respondents

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RESPONDENTS' BRIEF ON REARGUMENT

INTRODUCTION AND SUMMARY OF ARGUMENT

In the exercise of its power to regulate interstate commerce Congress could have banned all flat State taxes on heavy trucks. Given this Court's decision in *Pennsylvania v. Union Gas Co.*, there is now little doubt that despite the Eleventh Amendment, Congress would have the power to subject the States to monetary liability for violating such a ban. There is, however, an important constraint on such exercises of congressional power. The Court has recognized that legislation rendering the States liable to pay monetary awards upsets the tradi-

tional balance between State and federal governments. Congress therefore cannot impose liability on State governments *unless* its intentions are clearly set forth in the text of the legislation. This clear statement requirement ensures not only that Congress has acted deliberately, but also that the States have been put on notice of potential liability in the future.

By relying on the fiction that *American Trucking Ass'ns, Inc.* v. *Scheiner* has always been the law—which is to say that the rule of *Scheiner* applies retroactively, petitioners would have the Court subject Arkansas to monetary liability without any advance notice. That would place the Court, in cases arising under the Commerce Clause, in the position of having greater lawmaking power than Congress. But the Eleventh Amendment was designed to restrain the federal judiciary, and the principles of federalism embodied in that constitutional provision are all the more compelling when Supreme Court adjudication rather than congressional legislation is involved.

Far from respecting the traditional balance between the States and the federal government, petitioners seek to dismantle it. They propose that the Court grant them a monetary remedy in order to deter State legislators from violating the Commerce Clause. State financial concerns, they say, should be disregarded in the interest of forcing elected representatives to toe the line. Petitioners, in short, urge the Court to act in direct contradiction of the Eleventh Amendment and the traditional balance between the States and the federal government.

Even if the Court were to accept petitioners' theory and devise a national law of tax refunds, petitioners still would not be entitled to recover in this case. Petitioners claim

they should be compensated because they were "victims of discrimination." But the constitutional defect in the HUE tax resulted from its potential pressure on interstate carriers to reduce per mile costs by confining their operations to Arkansas. Under the internal consistency test of *Scheiner*, the "victims" of the Arkansas flat tax were therefore those interstate truckers who succumbed to the pressure to conduct their business in the State—in other words, the truckers who ran up the most miles in Arkansas and therefore engaged in the least amount of interstate transportation. But those truckers, who petitioners do not purport to represent, would have had the *lowest* costs per mile, and any unconstitutional injury they suffered could not be measured by the amount of the tax they paid or the costs per mile they incurred.

Petitioners ignore this and persist in trying to squeeze the facts of this case into one or the other of two distinct forms of tax discrimination outlawed by the Commerce Clause. Sometimes they claim discrimination from a tax that favored intrastate commerce over interstate commerce; in their more recent arguments, they claim discrimination from a tax that favored local businesses over foreign businesses. The Arkansas HUE tax did neither.

Petitioners are carriers who decided to base register their heavy trucks in States other than Arkansas. (Carriers have great freedom in determining where to register their trucks.) According to them, they suffered from discrimination because in one year their average costs per mile under the HUE tax (3.2 cents per mile) were more than the average of carriers with heavy trucks registered in Arkansas (1 cent per mile). But every heavy truck making up petitioners' statistical comparison—regardless where the truck was registered—was engaged in interstate transportation, as they now concede. Peti-

tioners have not established any discrimination in favor of intrastate commerce. Indeed, they have been unable to identify the costs per mile of even one intrastate heavy truck that was subject to the HUE tax.

When it comes to the local-foreign form of tax discrimination, petitioners want to be known not simply as interstate truckers, but as out-of-state taxpayers. Some of them doubtless fit that description, but many do not. All of them have in common merely the fact that at some point in this case their trucks did not carry Arkansas plates. But that has nothing to do with discrimination against out-of-state businesses. If, for one moment, these petitioners had truly believed that the advantage under the HUE tax went to trucks registered in Arkansas, they could have easily changed the registration of their fleets and become members of the favored class. In fact the opposite occurred, as so-called Arkansas truckers transformed themselves into out-of-state taxpayers by changing the plates on their vehicles.

Take, for example, Jones Truck Lines (JTL), a lead plaintiff and one of the named petitioners. JTL is a company headquartered in Arkansas which decided after this case began to register its trucks outside the State. According to petitioners' lights, that made JTL an "out-of-state taxpayer," although it was no such thing. The example of JTL is far from isolated. During the course of this litigation more than half of the trucks originally registered in Arkansas switched registration to another State. Their actions show what petitioners obscure—that the State of a carrier's base registration was about as important in terms of HUE tax cost as the color of its trucks and had nothing whatever to do with its status as a local or foreign business.

Moreover, petitioners invoke *averages* to support the notion that they were victims of discrimination. It is simply not true that Arkansas applied one tax rate to trucks with Arkansas plates and a higher rate to trucks with plates from other States. The fact is that even among petitioners there were large disparities in costs per mile under the tax. The same is true with respect to the Arkansas base-registered truckers, half of whom paid more than the average of 1 cent per mile.

When one cuts through all the rhetoric about discrimination, petitioners' complaint reduces to the unremarkable proposition that some truckers paying the $175 yearly fee had lower costs per mile than others. But if such inequalities were to be mended retroactively through a monetary award, it would be of no moment where the truck was base-registered. Petitioners, however, cannot face up to this. If they did so, they would have to concede that their claims have nothing whatever to do with discrimination against out-of-state businesses—as indeed they do not.

Petitioners, in short, are not "victims of discrimination" in any meaningful sense and they do not constitute a class of carriers who felt the unlawful effect of the HUE tax under the Commerce Clause. They are accordingly entitled to no monetary relief from the State of Arkansas.

ARGUMENT

A.

IN LIGHT OF *UNION GAS*, THE COURT MAY NOT IMPOSE RETROACTIVE MONETARY LIABILITY ON THE STATES IN CASES ARISING UNDER THE COMMERCE CLAUSE

In cases arising under the Commerce Clause, this Court has no greater lawmaking power than Congress

when it enacts legislation pursuant to that constitutional provision.[1] In fact, the Court has a good deal less. While Congress can affirmatively regulate interstate commerce, this Court cannot.[2] In light of these principles, *Pennsylvania* v. *Union Gas Co.*, 109 S. Ct. 2273 (1989), decided late in the Term, significantly affects this case.

The plurality opinion in *Union Gas*, representing the views of four Justices, concluded that because the Eleventh Amendment was designed "to rein in the judiciary, not Congress," Congress can abrogate the States' sovereign immunity by exercising its Article I power to regulate commerce among the several States. 109 S. Ct. at 2283 (Justice Brennan, joined by Justices Marshall, Blackmun and Stevens). However, as Justice White indicated in his concurring opinion, and as a majority of the Court agrees, Congress cannot render the States liable to pay monetary judgments unless the text of the statute unmistakably creates this remedy.[3] Justice Scalia's dissenting opinion in *Union Gas*, joined by the Chief Justice and two other Justices, concluded that in light of the Eleventh Amendment, Congress did not have the power to enact legislation pursuant to the Commerce Clause that would subject the States to monetary awards. 109 S. Ct. at 2295 (Justice Scalia, joined in part by the Chief Justice and Justices O'Connor and Kennedy).

[1] *Erie R. R.* v. *Tompkins*, 304 U.S. 64, 78 (1938); Friendly, *In Praise of Erie—and of the New Federal Common Law*, in *Benchmarks* 155, 167 (1967) ("Yet it would be even more unreasonable to suppose that the federal courts have a lawmaking power which the federal legislature does not.").

[2] *See, e.g., Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981) ("the existence of congressional authority under Art. I" does not "mean that federal courts are free to develop a common law to govern those areas until Congress acts").

[3] 109 S.Ct. at 2289 (Justice White, joined in part by the Chief Justice and Justices O'Connor and Kennedy). *Accord, Hoffman* v. *Conn. Dep't of Income Maintenance*, 109 S.Ct. 2818, 2822 (1989) (plurality opinion); *Dellmuth* v. *Muth*, 109 S.Ct. 2397, 2401 (1989) ("evidence of congressional intent must be both unequivocal and textual"); *Will* v. *Michigan Dep't of State Police*, 109 S.Ct. 2304 (1989); *Welch* v. *Texas Dep't of Highways and Public Transp.*, 483 U.S. 468, 474 (1987) (plurality opinion); *Quern* v. *Jordan*, 440 U.S. 332, 345 (1979) (Congress must "explicitly and by clear language indicate on [the] face [of the statute] an intent to sweep away the immunity of the States"); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 243 (1985).

A judgment in petitioners' favor in this case would be inconsistent with each of these opinions in *Union Gas*. If, as the plurality in *Union Gas* states, Congress can abolish State sovereign immunity pursuant to the Commerce Clause because the Eleventh Amendment only limits the federal judiciary, the Court itself cannot subject the States to monetary relief in the absence of federal legislation so providing. While Congress' power may not be circumscribed, the power of this Court is.

Justice White stated in his concurring opinion that Congress, in the exercise of its Article I power, can render the States liable only if the text of the legislation unmistakably provides such relief. This "clear statement" rule not only ensures that Congress has acted deliberately, but also gives notice to the States that in the future—prospectively—they may have to pay monetary judgments from their treasuries if they violate the newly-enacted legislation.

In this case, to engage in the fiction that *Scheiner* has always been the law, which is to say that it applies retroactively, would be to subject the affected States to monetary liability without any prior warning. The Court, of course, has never given notice to the States that violations of the Commerce Clause would subject them to monetary liability. But that is not all. Because *Scheiner* overruled several of the Court's longstanding decisions upholding flat highway taxes, the States received no advance notice

that they would even be violating the Commerce Clause if they enacted such taxes.[4] The Court's recent decisions in *Hoffman* v. *Conn. Dep't of Income Maintenance*, 109 S.Ct. at 2822 (plurality opinion); *Dellmuth* v. *Muth*, 109 S. Ct. at 2308; and *Will* v. *Michigan Dept. of State Police*, 109 S.Ct. at 2308, as well as *Union Gas*, would constrain Congress if it sought to achieve such a result. Whatever the theoretical underpinnings of the Court's Commerce Clause decisions, the Court can exercise no greater authority over the States than Congress and therefore cannot subject Arkansas to monetary liability by declaring that the rule of *Scheiner* governs not only the future, but the past.

The four dissenting Justices in *Union Gas* believed that under the Commerce Clause Congress could not subject the States to monetary awards. It follows that the Court, in a case arising under that constitutional provision, could not achieve that end by reading into the negative implications of the clause a power Congress itself did not possess.

B.

THE ELEVENTH AMENDMENT MAY NOT BE DISREGARDED IN THE INTEREST OF DETERRING STATE LEGISLATORS

Petitioners think that the Eleventh Amendment and the "principles of federalism" it reflects[5] are irrelevant because this case is here on writ of certiorari to the

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[4] See our Brief, at 29-32. Shortly before Arkansas enacted its flat tax on heavy trucks, Congress enacted the Surface Transportation Assistance Act of 1982, which increased flat taxes on heavy trucks to a maximum of $1900 per year. See note 34 *infra*.

[5] *Dellmuth* v. *Muth*, 109 S.Ct. at 2400, quoting *Pennhurst State School and Hospital* v. *Halderman*, 465 U.S. 89, 100 (1984); and *Hutto* v. *Finney*, 437 U.S. 678, 691 (1978).

Arkansas Supreme Court. Pet. Reply Br. 1-8. We disagree.

The first reason petitioners offer—that *Hans* v. *Louisiana*, 134 U.S. 1 (1890), is not good law—has been rejected. *Dellmuth* v. *Muth*, 109 S.Ct. at 2401 n.2.

Petitioners' second argument is that the Court has decided some 60 cases on review from State courts where the Eleventh Amendment might have been raised. Pet. Reply Br. 2-5, App. 1a-3a. These citations, many of which were drawn from a law review article,[6] "do not stand for the proposition that the Court has developed a different rule of state immunity [under the Eleventh Amendment] in appellate, as opposed to original, court cases." Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 Harv. L. Rev. 1372, 1385 n.78 (1989). The question presented here was not before the Court in these earlier cases. *See Will* v. *Michigan Dep't of State Police*, 109 S.Ct. at 2307 n. 4.[7]

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[6] Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1 (1988).

[7] Petitioners concede that "[i]t apparently was not argued in any of these cases that the Eleventh Amendment circumscribed this Court's appellate jurisdiction." Pet. Reply Br. 4-5. *See Patsy* v. *Board of Regents*, 457 U.S. 496, 515-16 n.19 (1982) (Court will not dismiss *sua sponte* on Eleventh Amendment grounds not raised by the parties). Indeed, the oldest decision cited by petitioners (Pet. Reply Brief 3a) makes clear that if the parties do not object to the form of the remedy in a tax case on review from a State court, this Court will assume the remedy is proper under State law. *State Tonnage Cases*, 79 U.S. (12 Wall.) 221, 223 (1871) (recognizing that "[d]ifferent remedies are accorded to a complaining party in different jurisdictions" when state taxes are challenged).

Most of the cases cited in the Appendix to petitioners' reply brief are also distinguishable in other respects. In many of the cases, the

As to our argument that the text of the Eleventh Amendment applies to this case, as it plainly does,[8] petitioners respond that in the past the Court has shown a "willingness to depart from the literal language in construing that provision." Pet. Reply Br. 5 n.7. The answer is useless. Federal courts are not free to disregard the positive commands of the Eleventh Amendment simply

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state taxes were paid under "protest," and recovery of the tax payments was sought through a refund procedure established by State law. *E.g.*, *Norfolk & Western Railway Co.* v. *State of North Carolina ex rel. Maxwell*, 297 U.S. 682, 683 (1936); *MacAllen Co.* v. *Massachusetts*, 279 U.S. 620, 624 (1929). In other cases the refund issue was mooted because the State tax was upheld as lawful. *E.g.*, *Container Corp.* v. *Franchise Tax Board*, 463 U.S. 159 (1983); *Pacific Co.* v. *Johnson*, 285 U.S. 480 (1932). In several recent cases, the question of "remedy" was expressly left for decision on remand to the State courts. *E.g.*, *Williams* v. *Vermont*, 468 U.S. 263, 277 (1984). And in at least one case petitioners cite, it is unclear whether a refund was even sought as a remedy. *E.g.*, *Shell Oil Co.* v. *Iowa Dep't of Revenue*, 109 S.Ct. 278 (1988) (challenge to State determination that company's tax payment was deficient in amount).

[8] Since the Eleventh Amendment restricts "the Judicial Power of the United States" it fully applies not only to the lower federal courts but also to this Court; no exception is made for the Court's appellate jurisdiction. See our opening Brief, at 16-19; Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 32-39 (1988).

Moreover, there is no doubt that Congress could subject State court decisions to review in the courts of appeals or in a national court of appeals. See Friendly, *Benchmarks*, *supra*, at 194 & n. 197 ("Existence of such power, noted in *The Federalist* No. 82 (Hamilton), seems beyond doubt."). Petitioners' submission, which seeks to carve out an exception for this Court's appellate jurisdiction under Article III, leads to the untenable result that the Eleventh Amendment would restrict a federal court of appeals reviewing a state court judgment but would not apply when the same case eventually reached this Court.

because petitioners think this would advance the negative implications of the Commerce Clause.

Moreover, when the Court has construed the Eleventh Amendment, it has done so generously in light of the important policies it promotes. The Amendment preserves "the fundamental constitutional balance between the Federal Government and the States," *Atascadero State Hospital* v. *Scanlon*, 473 U.S. at 238, as the Court reiterated last Term, *Dellmuth* v. *Muth*, 109 S.Ct. at 2401; *Will* v. *Michigan Department of State Police*, 109 S.Ct. at 2308. It accomplishes this end by preventing the federal judiciary from imposing monetary burdens on the States for conduct in the past (see our opening Brief, at 15-23). These policies fully apply regardless whether the case is in a lower federal court or in this federal Court.

Furthermore, in *Will* the Court held that States cannot be sued under 42 U.S.C. § 1983 in State courts. *Will* recognizes that the federal-State balance preserved in the Eleventh Amendment would be upset if Congress sought to subject States to monetary liability in State court actions. The same would be true if, instead of Congress, this Court did so by creating a federal law of tax refunds binding on the State courts in cases arising under the Commerce Clause.

Petitioners protest that if the Eleventh Amendment applied in this Court, the supremacy of federal law would be undermined. Pet. Reply Br. 7. This assumes the point at issue. The Eleventh Amendment is supreme federal law. Petitioners also ignore the distinction, recognized last Term in *Quinn* v. *Millsap*, 109 S.Ct. 2324, 2330 (1989), between the Court's power to order a particular remedy for a constitutional violation and its power to adjudicate whether a constitutional violation has

occurred. In light of the Eleventh Amendment, the distinction is vital. *Green* v. *Mansour*, 474 U.S. 64, 68 (1985), carefully differentiated, for purposes of the Eleventh Amendment, between "[r]emedies designed to end a continuing violation of federal law . . . necessary to vindicate the federal interest in assuring the supremacy of that law" and remedies—such as the ones petitioner propose—serving only "compensatory or deterrence interests."[9]

Petitioners' contentions, if adopted, would strike at the heart of the Eleventh Amendment. They say the Court should order retroactive monetary relief because the States need to be disciplined.[10] The Court, in their view, should control the "impulse[s]" of "state legislators" and deter these elected officials from violating the Commerce Clause. Pet. Brief 30. In performing this function, the Court should not be "solicitous of a state's financial concerns." *Amicus* Brief 23. Petitioners, in short, invite this Court to make a shambles of the constitutional balance of power between the States and the federal government, a balance of power the Eleventh Amendment was intended to preserve. *Atascadero*, 473 U.S. at 242.

To make matters worse, they ask this of the Court without any factual predicate. The Arkansas legislature

[9] The supremacy and uniformity of federal law are protected even though the Eleventh Amendment bars the Court from subjecting the States to retroactive monetary liability. For the reasons discussed in our opening Brief (at 20-21), the Eleventh Amendment does not apply to injunctive actions and does not restrict the power of this Court, on review of State court judgments, to determine whether a State law violates the Commerce Clause.

[10] *See, e.g.*, Pet. Brief 30-33; Pet. Reply Brief 16-17; Brief for American Trucking Associations, Inc., *et al.*, as *Amici Curiae* in support of petitioner 18-21, 23, in *McKesson Corp.* v. *Div. of Alcoholic Beverages and Tobacco*, No. 88-192, Oct. Term. 1989 (hereafter *Amicus* Brief.).

of 1983, which enacted the HUE tax, did not flout the Constitution. At the time, the outstanding decisions of this Court had sustained similar taxes and Congress, exercising its power under the Commerce Clause, had also imposed a flat tax on heavy trucks.[11] In the face of this, petitioners retreat to "the generality of situations," where State legislatures supposedly enact tax statutes in violation of the Commerce Clause. *Amicus* Brief, 20; Pet. Reply Brief 17. One is left to wonder how petitioners will prove this assertion if they ever make the attempt. We are aware of no survey showing to what extent State legislatures have intentionally violated the Commerce Clause and, petitioners' intuition to the contrary notwithstanding, it does not seem to us the elected representatives of the people tend to disregard the decisions of this Court. They, like their federal counterparts, take seriously their oath under Article VI to support the Constitution.

C.

PETITIONERS' CLAIM FOR RELIEF NECESSARILY RESTS ON FEDERAL LAW

Petitioners cannot avoid the consequences of *Union Gas* and the other decisions we have discussed by invoking some alleged State law cause of action.[12] Regardless of

[11] See our opening Brief, at 29-32; and n.34 *infra*.

[12] At oral argument, petitioners claimed that because the Arkansas Supreme Court awarded refunds of the *escrowed* taxes, this proved the State had no sovereign immunity with respect to refunds of taxes deposited in the State treasury. Tr. of Oral Argument 9. That is not correct. Earlier in this case petitioners fully understood that under Arkansas law, immunity attaches once the proceeds of the tax have been deposited in the treasury. See our opening Brief, at 14 n.4. Funds held in escrow are not in that category. *Cf. Florida Dep't of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670 (1982) (plurality opin-

what label petitioners place on it, their ultimate contention necessarily is that under *federal law* they *should* recover a monetary award against the State.[13] This is why

ion) (no sovereign immunity when property is in the hands of State officers).

The State's immunity rests not only on the provision in the Arkansas Constitution forbidding suits against the State without its consent. It is also based on the State constitutional provision forbidding money to be drawn from the treasury except by legislative appropriation. Ark. Const. Art. 16 § 12. A similar provision in the United States Constitution (Art. I, § 9, cl. 7) supports the sovereign immunity of the United States. *United States* v. *Testan*, 424 U.S. 392, 399-402 (1976); *Pennsylvania* v. *Union Gas Co.*, 109 S.Ct. at 2298 (Scalia, J., dissenting).

In State court, petitioners therefore agreed—as they said "everyone" did—"that the only appeal or recovery of these funds once they had been deposited into the Treasury of the State probably lies with the Arkansas State Claims Commission." R. 670-71. The Claims Commission was created in order to provide an avenue for relief "while maintaining the State's sovereign immunity." Pltffs.' Ex. 12, R. 2587, at p. 3. The Claims Commission has "exclusive jurisdiction" over claims for tax refunds against the State and the "State Highway-Transportation Department." *Id.* at 4. "Non-controversial claims . . . for refund of taxes . . . receive immediate payment not to exceed $1,000.00." *Id.* at 5. Other claims for tax refunds must be approved by the Commission, which follows detailed adjudicatory procedures in making its determinations. *Id.* at 8-16. If the Commission approves the claim, the claim is submitted to the Arkansas General Assembly "for its approval and subsequent appropriation of funds before payment can be rendered." *Id.* at 5. (All of this further refutes petitioners' mistaken idea that, as a matter of State law, Arkansas cannot assert sovereign immunity in defense of actions for tax refunds.)

[13] Otherwise, this Court would not have jurisdiction under 28 U.S.C. § 1257. See also the Rules of Decision Act, 28 U.S.C. § 1652.

Why retroactivity in this context is a question of federal law petitioners do not explain. In other State court cases involving facts similar to this case, the question of retroactivity (as well as the question of monetary recovery) has been treated as a state law issue.

they claim that a monetary remedy is "federally-compelled" (Pet. Brief 28). It matters little whether they bring the Commerce Clause in through the back door by framing their arguments in terms of a federal law of retroactivity or whether they rely directly on the Commerce Clause, as they do in their *amicus* brief. The constraints on this Court are not dependent on how petitioners choose to characterize their contentions. In any event, the arguments produced in their *amicus* brief differ little from the arguments produced here under the heading of retroactivity, although the former are more lavishly decorated.[14] It is apparent that in order to prevail, petitioners must persuade the Court to devise a national law governing monetary remedies when State tax statutes are found to have violated the Commerce Clause. Having *Scheiner* declared retroactive may remove one barrier to their recovery, but it does not entitle them to relief and it certainly does not lead to the conclusion petitioners urge upon the Court—that there should be a "federally-compelled refund remedy" requir-

See American Trucking Ass'ns v. *Conway*, No. 88-156, Supreme Court of Vermont, slip op. 9 (Aug. 25, 1989) (applying the "standards enunciated in *Solomon* v. *Atlantis Development, Inc.*, 145 Vt. 70, 74, 483 A.2d 253, 256 (1984)"); *James B. Beam Distilling Co.* v. *Georgia*, 382 S.E. 2d 95 (Ga. 1989).

[14] In their Brief in this case (at p. 27), petitioners argue that they should recover a monetary award because a ruling in their favor would "promote Commerce Clause values." Those values are deterring State legislatures from violating the Constitution and undoing discrimination by granting retroactive compensation. Pet. Brief at 10-11, 27, 30-31. Their *amicus* brief contains the same arguments, embellished with "intermediate points along the spectrum" and with scales calibrated to balance costs to the States against deterrent effects on their elected representatives. *Amicus* Brief, at 18, 23, 27, 28.

ing Arkansas to compensate them for the alleged "unconstitutional discrimination that petitioners suffered on account of the HUE tax." Pet. Brief, at 28, 38.[15]

D.

PETITIONERS ARE NOT "VICTIMS OF DISCRIMINATION" ENTITLED TO MONETARY RELIEF

Although, as we have argued, the Commerce Clause does not confer upon the Court the power to devise retroactive monetary remedies against the States, our objection does not rest on that ground alone. Whether a particular monetary remedy should be created also depends on whether that remedy accomplishes the purpose for which it is proposed. Here it does not. In view of the oral argument in this case and decisions of the Court later in the Term, it is appropriate to provide a more detailed explanation of why this is so.

As a class consisting of all non-Arkansas base registered carriers who paid the HUE tax (*see* note 27 *infra*), petitioners seek recovery on the ground that they were "victims of discrimination." But they are far from precise about what they mean by this. Their arguments have shifted between two distinct forms of unlawful tax discrimination in cases arising under the Commerce Clause. The first occurs when a State tax favors intrastate commerce over interstate commerce. The second takes place when a State tax treats similar interstate transactions differently by "favor[ing] local enterprises at the expense of out-of-state businesses" (*Boston Stock Exchange* v.

[15] According to petitioners, "federal law requires" at a minimum "a refund of such amount as is necessary to undo the unconstitutional discrimination that petitioners suffered on account of the HUE tax." Pet. Brief 38.

State Tax Comm'n, 429 U.S. 318, 329 (1977)).[16] Petitioners sometimes argue that the HUE tax fell into the former category; more often they argue it fell into the latter. *E.g. Amicus* Brief, at 6, 20, 29. As we will explain in a moment, the fact is the HUE tax gave rise to neither form of discrimination.

At oral argument we were asked whether our position in this regard meant that the HUE tax was not unconstitutional despite *Scheiner*. We answered no, explaining that the HUE tax was invalid for a separate reason—namely, its failure to pass *Scheiner's* internal consistency test.[17] This is vitally important because "the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974). If, as we will show, petitioners have misidentified the nature of the constitutional violation here, their arguments for a monetary award must fail.

In *Healy* v. *Beer Institute, Inc.*, 109 S.Ct. 2491, 2499 (1989), the Court explained that to determine the validity of a State statute under the Commerce Clause, "the practical effect of the statute must be evaluated . . . by considering . . . what effect would arise if not one, but many or every State adopted similar legislation." It was such an evaluation that spelled the doom of the Arkansas HUE tax in view of the Court's decision in *Scheiner*. If every State imposed a $175 yearly tax on heavy trucks, interstate commerce would be deterred. In order to control costs, interstate carriers would seek to restrict the number of States they entered. In *Amerada Hess Corp.* v. *Director, Div. of Taxation*, 109 S. Ct. 1617, 1623 (1989),

[16] *See Brown-Forman Distillers* v. *N.Y. Liquor Authority*, 476 U.S. 573, 579 (1986).

[17] Tr. of Oral Argument, at pp. 47-49.

the Court made the point succinctly. Because the axle tax in *Scheiner* "applied to both in-state and out-of-state trucks," it was not facially discriminatory. But the tax "nonetheless had a discriminatory effect by exerting 'an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States'" (quoting *Scheiner*, 483 U.S. at 286-87).

In view of these decisions and *Scheiner*, the so-called "victims" of the HUE tax could not have been petitioners, who claim to have travelled the fewest miles in Arkansas.[18] Whatever pressure the HUE tax exerted, petitioners clearly did not feel it. The "victims" were instead the interstate businesses who succumbed to the pressure to "ply their trade" within Arkansas. In other words, those who could have suffered from the unconstitutional effect of the flat tax were the interstate carriers who logged most of their miles in Arkansas and thus engaged in the least amount of interstate transportation. But those carriers necessarily had the *lowest* costs per mile in terms of that tax and petitioners do not purport to represent them.

Petitioners ignore the internal consistency test. According to them, the problem with the HUE tax was that it discriminated. At various points, petitioners describe this discrimination as against interstate commerce and in favor of intrastate commerce. To support this, they rely on statistics showing that Arkansas base-registered carriers paid, on average, $.01 per mile under the HUE tax, while non-Arkansas base-registered car-

[18] Petitioners purport to be a group of interstate carriers who, on average, logged relatively few miles on Arkansas's highways. *But see* pp. 23-24 *infra*.

riers—that is, petitioners—paid, on average, $.032 per mile during one tax year. This leads them to contend that in order to put interstate commerce back on a plane of equality with intrastate commerce,[19] the State must be ordered to pay them back the difference, or in their words, the "discriminatory component."[20]

[19] Pet. Brief 9, 28; Pet. Reply Brief 16.

[20] To complicate matters, petitioners' *amicus* brief in the companion case contains a different version of what federal law requires in the way of retroactive monetary relief against the States for Commerce Clause violations.

Now the idea is that "[a]ny taxpayer victimized by unconstitutional discrimination" should recover an amount "determined by computing how much the taxpayer would have paid if the state had raised the same amount of money through a nondiscriminatory tax." *Amicus* Brief, at p. 29 n. 13. This opens up an entirely new can of worms.

How in the world can it be determined what someone would have paid under some constitutionally-valid tax system that never existed? Petitioners' unstated premise is that States have only two systems of taxation to choose from—one constitutional and other unconstitutional. The premise is false. Take highway taxes for example. Instead of a flat tax on heavy trucks, a State might have raised the needed funds by increasing its registration fees for such trucks. Or it might have increased its fuel taxes. Or it might have imposed per mile charges increasing as the weight of the truck increased. An 80,000 pound truck could be charged, for example, 5 cents per mile while a 73,280 pound truck could be charged 3 cents per mile. Or a State might have imposed per mile charges on the basis of weight and vehicle configuration. ("Vehicle configuration is an important determinant of highway cost responsibility; two vehicles with the same gross weight but different configurations may have significantly different highway cost responsibilities because axle loads are distributed differently." U.S. Dep't of Transportation, *The Feasibility of a National Weight-Distance Tax* II-13 (Report of the Secretary of Transportation, December 1988) (hereafter *Report of the Secretary of Transportation*.)

Any one of these tax systems, singularly or in combination, would be constitutional. Each would lead to a different result under petitioners' theory.

Petitioners are mixing apples and bricks. The supposed 3:1 "disparity" constituting discrimination against interstate commerce and in favor of intrastate commerce (Pet. Brief 28 n.18) does not exist. Petitioners' numbers merely compare the average costs of one group of *interstate* carriers—those with trucks base registered in Arkansas—with another group of *interstate* carriers—those with trucks base registered elsewhere. They have now admitted as much.[21] Ordering Arkansas to pay petitioners any sum of money would not put interstate commerce back on a plane of equality with intrastate commerce because they were not on an unequal plane in the first place.

Petitioners also suggest that the HUE tax discriminated against them in a different way by placing greater burdens on those outside the State while giving an advantage to local businesses. They inject this notion into the case by describing themselves as "out-of-state truckers"

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[21] Pet. Reply Brief 18. Without any factual support, petitioners insist there must have been some intrastate trucks in Arkansas weighing over 73,280 pounds because—as if this supports their assertion—a federal agency has used, for comparison's sake, the figure of 70,000 miles per year when it examined taxes on heavy trucks. *Id.* at 19 n.19. (The agency itself has warned that it is not claiming these mileage figures represent "common or average vehicles." J.A. 134.)

Petitioners make two other unsupported assumptions in this regard. First, they assume that if there were an intrastate truck subject to the HUE tax, that truck must have been in someone else's fleet rather than their own. There is no reason why this would necessarily be so, particularly since many petitioners are in fact Arkansas companies. Second, petitioners assume that if there were such an intrastate truck it must have had a lower cost per mile than their average 3.2 cents. (Otherwise they could not claim discrimination.) But as petitioners' evidence showed, even among interstate carriers total Arkansas miles—and thus HUE tax costs per mile—varied widely.

or "out-of-state taxpayers" as distinguished from "in-state truckers." But petitioners are not and do not purport to be a class of carriers who were domiciled outside Arkansas or who resided in some other State or whose principal place of business was in another State.[22] They were "out-of-state" in one sense only—their trucks were not base registered in Arkansas.[23]

Consider, for example, Jones Truck Lines, Inc. ("JTL"), a named petitioner in this Court and one of the *amici* in the companion case.[24] As a non-Arkansas base registered carrier, JTL is an "out-of-state taxpayer" and one of petitioners' "victims of discrimination" entitled to a monetary

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[22] These are the criteria used by the Court in determining whether a state statute has caused such discrimination. *See generally* Smith, *State Discriminations Against Interstate Commerce*, 74 Calif. L. Rev. 1203, 1219-1220 (1986).

[23] *See* our opening Brief, at 35 n.30. It is a mistake to think of the registration of these trucks in the same way one commonly views automobile registration. If one sees an automobile with a Maryland license plate, for example, it is safe to assume the owner resides in Maryland. Not so with heavy trucks. Interstate carriers register their *fleets* under the International Registration Plan. They have great freedom in choosing the State in which they register. J.A. 80. Many carriers do not even maintain their business records in the State where their fleet is base registered and they are not required to do so. *Id.* In order to register within a State, the carrier need only have a rented "structure" and a "telephone." J.A. 81. There is no requirement that every truck in the fleet actually accrue miles within the State of base registration. *Id.*

Moreover, the IRP deals only with the registration of "power units" (J.A. 78). As a result, a tractor could be registered in one State while the trailer attached to it could be registered in another State. *See* U.S. Dep't of Transportation, Federal Highway Administration, *Road User and Property Taxes on Selected Motor Vehicles* 3 (1987).

[24] Pet. Brief, at iii.

award. Yet by its own admission, JTL "is a corporation organized and existing under the laws of the State of Arkansas, with its principal place of business located in Springdale, Arkansas." J.A. 10. Indeed, at one point in this lawsuit, JTL base registered its 362 trucks in Arkansas. See Pltffs. Ex. 47, at R. 2880. At that time, JTL's trucks averaged $.0092 per mile in HUE tax costs and it was treated by petitioners as an in-state carrier. *Id.*

However, during the course of this litigation, JTL decided to register its fleet outside the State.[25] By petitioners' lights, JTL thus became entitled to wear the mantle of "victim of discrimination." Bluntly put, that is utter nonsense. JTL simply removed the Arkansas plates from its vehicles and replaced them with another State's. That had the same effect on its costs per mile under the tax and on its status as a local or foreign business as if JTL had painted its trucks a different color.

JTL's situation is no mere isolated example. By 1987, *most* of the Arkansas base-registered carriers listed by petitioners had registered their trucks outside the State.[26] Like JTL, each of these carriers is now before the Court seeking to share in a monetary award because, by changing license plates, each was magically transformed

[25] *See* Exhibit 3, at 303, filed with respondents' Brief before the Arkansas Supreme Court on remand from this Court (hereafter "Exhibit 3"). As explained in that Brief (pp. 4-5), Exhibit 3 is the Arkansas Highway and Transportation Department's list of all non-Arkansas base registered carriers subject to the HUE tax in the 1986-87 tax year.

[26] *See* the Addendum to this Brief.

from one who benefited to one who suffered from the HUE tax.[27]

That is far from all that is wrong with petitioners' case. Their position also suffers from the fact that the disparity they designate as "discrimination" consists of *average* costs per mile. Averages may be "seductive," but they can also be highly misleading.[28] Blending their averages with the rhetoric of discrimination, petitioners frame their arguments as if Arkansas imposed different tax rates on them. Of course the HUE tax did no such thing. Petitioners paid an *average* cost of $.032 per mile, which

[27] We must confess to having been confused about the identity of the petitioners in this case. Although petitioners never clearly described themselves in the body of their Brief, they named, among others, Jones Truck Lines and Leon Cawood as two of the class representatives in this Court. Pet. Brief ii-iii. Because Jones and Cawood were Arkansas base registered carriers in 1983 (R. 2871), we had supposed that the petitioners in this Court therefore included both Arkansas and non-Arkansas base registered carriers. See our opening Brief, at 4, 34-36. We found that puzzling, however, because petitioners were seeking a monetary remedy solely for non-Arkansas base registered carriers. *Id.*

Petitioners responded that we were mistaken, that they consisted of only the non-Arkansas base registered carriers. Pet. Reply Brief, at 18 n.18. Why they nevertheless listed Jones and Cawood as petitioners still remained a mystery until we examined Exhibit 3, at pp. 303, 338 (see note 25 *supra*) and discovered that both of these carriers had later changed the registrations of their heavy trucks to a State other than Arkansas and were therefore now purporting to be "out-of-state truckers."

[28] J. Paulos, *Innumeracy: Mathematical Illiteracy and Its Consequences* 126 (1988) ("Recall the chestnut about the man who reports that, though his head is in the oven and his feet in the refrigerator, he's pretty comfortable on average.").

means that some of them paid more and some of them paid less.[29]

Consider, for example, Commercial Carriers Inc. Like Jones Truck Lines, Commercial is a named petitioner and one of the *àmici* in *McKesson*. Petitioners classify Commercial as an out-of-state business because its trucks were base-registered outside of Arkansas. But the record shows that Commercial's 112 heavy trucks logged more than 2 million Arkansas miles during the survey year and wound up with a cost of $.0091 per mile, which was less than the $.01 average per mile cost of the supposedly favored group. R. 2899. Commercial is thus making the remarkable argument that it suffered discrimination at the hands of a tax treating it *better* in terms of average cost per mile than the supposedly favored class.[30]

It is also useful to look at the other side of this coin. More than one-half of the supposedly favored class of Arkansas base-registered truckers—nearly 53 percent—paid more than $.01 per mile in HUE taxes. R. 2950 (Ex. 50). Petitioners have not even attempted to explain why a heavy truck displaying Oklahoma plates is a victim of discrimination if it averaged more than $.01 per mile in HUE tax costs while a truck displaying Arkansas plates that also averaged more than $.01 per mile is not. If, as

[29] There is more to it than that. Petitioners' averages are derived from data consisting of the average cost per mile paid by a particular *carrier* for its entire fleet of heavy trucks. A carrier reporting, for example, an average cost of 3.2 cents per mile would have had trucks that presumably paid less.

[30] Ironically, the carrier with the *lowest* cost per mile under the HUE tax was one of the members of petitioners' class. According to petitioners' evidence, Ohio Pacific Express, Inc.'s 32 heavy trucks travelled 5,258,736 miles in Arkansas and had an average tax cost per mile of $.0011. R. 2858. Ohio Pacific Express's trucks were base-registered outside Arkansas (*id.*).

petitioners contend, the critical factor is how much a truck paid in per-mile costs, it matters not where the truck was base registered or where the company owning the truck was located.[31] Petitioners cannot admit this, however, because to do so would be to concede that their case does not and cannot rest on discrimination against out-of-state businesses.

In the end, petitioners' contentions boil down to the unremarkable proposition that heavy trucks paying the $175 flat tax wound up with different costs per mile depending on how many Arkansas miles they logged. This is the grievance that has produced all their outrage. But as we have discussed, that is not what rendered the HUE tax invalid. Inequality in terms of tax costs per mile for heavy trucks does not, *without more*, violate the Commerce Clause.[32] Registration fees vary widely among the

[31] It is odd for petitioners to invoke "fairness" as a reason for granting them monetary relief. Take two carriers, one with Arkansas plates and one with Texas plates and assume both had costs of 2 cents per mile under the HUE tax. Petitioners' idea of fairness is that the carrier with the Texas plates should get an award, but the carrier with the Arkansas plates should not. Or consider two carriers with headquarters in Springdale, Arkansas. The first registers all its trucks in Illinois; the second in Arkansas. Petitioners' notion of fairness is that the first is eligible for monetary relief while the second is not. Or suppose that a lump sum were paid to petitioners and they somehow distributed it among themselves so that each of them wound up paying 1 cent per mile. Is that "fair" in light of the fact that more than half of the Arkansas base registered carriers—who would not share in this bounty—paid *more* than 1 cent per mile (see p. 24 *supra*)?

[32] At all events, granting petitioners a monetary remedy would not equalize HUE tax costs per mile. *See* note 31 *supra*. There are but three ways retroactively to achieve such equality: (1) order the State to pay each carrier the full amount of the HUE taxes it paid during

States and truckers therefore incur different costs per mile depending on how many miles they run up in a particular State.[33] Yet the Court in *Scheiner* found such fees to be valid. Moreover, Congress has determined that there is no need to equalize tax costs per mile on heavy trucks. Exercising its power to regulate interstate commerce, Congress has for many years imposed a flat tax on trucks weighing more than 55,000 pounds,[34] and thus subjected petitioners and others to the inequality they complain about in this case.[35]

It bears repeating that the Commerce Clause problem with the HUE tax was that a proliferation of similar taxes

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each tax year; (2) find the carrier with the lowest average cost per mile and order the State to pay every other carrier the difference between that amount and the amount it averaged (see note 30 *supra*); or (3) find the carrier with the highest average cost per mile and require every other carrier to pay the State the difference between that amount and the amount that carrier averaged.

None of these "solutions" would depend on the carrier's State of base registration; and each is completely unrelated to any supposed discrimination against foreign businesses.

[33] *See Road User and Property Taxes 1987*, 29-32; and our opening Brief, at 38 & n.38.

[34] In 1982, Congress increased the maximum rate of the federal flat tax to $1900 per year for the heaviest vehicles. Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, §§ 513(a), 96 Stat. 2097 (1982). Congress later reduced this to its current maximum of $550 per year. 26 U.S.C. § 4481. (This flat tax applies to trucks with gross weights of at least 55,000 pounds.)

[35] "A 75,000 conventional tractor-semitrailer that travels 50,000 miles per year is, in effect, paying 1.08 cents per mile under this tax. In comparison, a conventional tractor-semitrailer registered at 80,000 pounds that travels 150,000 miles per year pays less than 0.4 cents per mile under this tax, even though its cost responsibility per mile would be higher." *Report of the Secretary of Transportation* VI-14.

in other States might eventually impede interstate commerce as carriers sought to maximize their in-state mileage and avoid additional charges when they crossed State borders. This application of *Scheiner's* internal consistency test is, as the Court explained in *Healy*, based on an evaluation of the *threat* to interstate commerce if all States enacted similar taxes in the future. Striking down the flat tax or, in the case of Arkansas, repealing the statute to comply with *Scheiner*, removed that threat.

On the other hand, retroactive monetary awards against the States in these circumstances—far from advancing interstate commerce—would impede it. In order to pay petitioners, Arkansas would have to use funds that would otherwise be spent on the State's highway system. Yet, as a recent article reported, the nation's highways are badly in need of repair and the "sprawling interstate system is crumbling just as it nears completion." *As Highways Decay Their State Becomes Drag on the Economy*, Wall St. J. A1, Aug. 30, 1989. Vast amounts of money are needed to maintain the highway system and, despite petitioners' claims to the contrary, heavy trucks have not been paying their fair share.[36] If the deterioration continues, the GNP, disposable income, employment and manufacturing productivity will be adversely affected.[37] On the other hand, the potential danger to interstate commerce posed by Arkansas' flat tax has been removed. The State Highway and Transportation Depart-

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[36] *Report of the Secretary of Transportation*, at VI-12 ("vehicles with registered gross weights over 65,000 pounds generally do not now contribute their fair share of highway revenues").

[37] U.S. Dep't of Transportation, Transportation Systems Center, *Highways and the Economy* xii-xiv, 114 (1983); P. Choate, *Bad Roads: The Hidden Costs of Neglect* 6 (1983).

ment's current operating revenues should now be used on the highway system, not to rectify some non-existent discrimination against a group of carriers who have in common only the fact that their heavy trucks were not displaying Arkansas plates when they inflicted their damage.

CONCLUSION

For the foregoing reasons and the reasons stated in our opening Brief, the judgment of the Arkansas Supreme Court should be affirmed.

Respectfully submitted.

ROBERT L. WILSON
A. T. GOODLOE, II
Arkansas Highway and
Transportation Department
P.O. Box 2261
Little Rock, Arkansas 72203
JOE MORPHEW
Revenue Legal Counsel
P.O. Box 1272-L
Little Rock, Arkansas 72203
JAY WILLS
Assistant Attorney General
200 Tower Building
Fourth & Center Streets
Little Rock, Arkansas 72201
Of Counsel:
CHRISTOPHER O. PARKER
Eichenbaum, Scott, Miller,
Liles & Heister
1400 Union National Bank Building
Little Rock, Arkansas 72201

A. RAYMOND RANDOLPH
DANIEL I. PRYWES
BRUCE R. STEWART
Pepper, Hamilton & Scheetz
1300 19th Street, N.W.
Washington, D.C. 20036
(202) 828-1200
HERSCHEL H. FRIDAY
Counsel of Record
B.S. CLARK
ROBERT S. SHAFER
Friday, Eldredge & Clark
2000 First Commercial Building
Little Rock, Arkansas 72201
(501) 376-2011
Counsel for Respondents

ADDENDUM

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Petitioners' survey, from which they derived their average costs per mile of Arkansas base-registered trucks, listed 2,903 such heavy trucks subject to the HUE tax. R. 2951. By 1987, more than 65% of these trucks had switched base-registration to a State other than Arkansas. Exhibit 3 (note 25 *supra*) shows that the following carriers listed as base-registered in Arkansas on petitioners' Exhibit 47 had registered their trucks outside Arkansas by the 1986-87 tax year:

Atlas Carriers Inc. (compare R. 2870 with Ex. 3, pp. 27-28)

Brazos Inc. (compare R. 2870 with Ex. 3, p. 59)

C&L Trucking Inc. (compare R. 2870 with Ex. 3, pp. 75, 77-81)

Cargill Inc. (compare R. 2870 with Ex. 3, p. 86)

Coca-Cola Bottling Co. (compare R. 2870 with Ex. 3, pp. 107-08)

Delp Inc. (compare R. 2871 with Ex. 3, p. 144)

Foremost Dairies Inc. (compare R. 2871 with Ex. 3, p. 194)

Harvey's Trucking Inc. (compare R. 2871 with Ex. 3, pp. 239, 9272)

Howard Barnes Livestock Trucking (compare R. 2871 with Ex. 3, p. 257)

J & J Trucking (compare R. 2871 with Ex. 3, pp. 266, 272)

J B Hunt Transport Inc. (compare R. 2871 with Ex. 3, p. 267)

J D & Billy Hines Trucking Inc. (compare R. 2871 with Ex. 3, p. 268, 285-86)

Jerry Hudson (compare R. 2871 with Ex. 3, p. 288)

Jones Truck Lines Inc. (compare R. 2871 with Ex. 3, p. 303)

Lasley Trucking Co., Inc. (compare R. 2871 with Ex. 3, p. 332)

Lendel Vines (compare R. 2872 with Ex. 3, p. 338)

Leon Cawood Trucking (compare R. 2871 with Ex. 3, p. 338)

Mass Merchandisers, Inc. (compare R. 2872 with Ex. 3, p. 363)

Nabisco Brands Inc. (compare R. 2872 with Ex. 3, p. 393)

O W Smith Transport Inc. (compare R. 2872 with Ex. 3, pp. 402, 408)

PAM Transport Inc. (compare R. 2872 with Ex. 3, pp. 410, 413-14)

R & D Trucking, Inc. (compare R. 2872 with Ex. 3, pp. 435, 438-39).

Ramon Rine Inc. (compare R. 2872 with Ex. 3, p. 442)

Richard Berry (compare R. 2872 with Ex. 3, p. 456)

Ricketts Trucking Co. Inc. (compare R. 2872 with Ex. 3, p. 458)

S & T Trucking (compare R. 2872 with Ex. 3, p. 487)

Scheduled Truckways Inc. (compare R. 2873 with Ex. 3, p. 490)

Sentinel Wood Treating, Inc. (compare R. 2873 with Ex. 3, p. 495)

Shippers Transports (compare R. 2873 with Ex. 3, p. 501)

Silica Transport Inc. (compare R. 2873 with Ex. 3, p. 503)

Singer Transportation Co., Inc. (compare R. 2873 with Ex. 3, p. 504)

Smith Trucking (compare R. 2873 with Ex. 3, p. 506)

Transus, Inc. (compare R. 2873 with Ex. 3, p. 569)

Tyson Foods Inc. (compare R. 2873 with Ex. 3, p. 578)

Virco Mfg. Corp. (compare R. 2873 with Ex. 3, p. 589)

Vulcan Material Co. (compare R. 2873 with Ex. 3, p. 590)

Willis Shaw Frozen Express Inc. (compare R. 2873 with Ex. 3, p. 613)